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Legally Tidy, Practically Less? The Supreme Court's Decision in the "Vitamin C Case"

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The Supreme Court issued a unanimous decision by Justice Ruth Bader Ginsburg in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, 585 U.S. __, 138 S. Ct. 1865 (2018).

The "Vitamin C case" was a class action lawsuit by U.S.-based purchasers of vitamin C manufactured in China, claiming that the Chinese manufacturers, with the coordination of their trade association, agreed to fix the prices and quantities of vitamin C exported to the United States, in violation of Sherman Act §1. The defendants moved first to dismiss and later for summary judgment, on the ground that Chinese law required their actions so that they were immune from §1 liability. On both occasions, China's Ministry of Commerce ("MOFCOM") submitted statements supporting the manufacturers. The plaintiffs countered MOFCOM's representations with the lack of any cited Chinese law or regulation that required the defendants' cartel, and with evidence that the manufacturers had contemporaneously announced the lack of government involvement in the cartel and China had stated to the World Trade Organization that it ceased export administration of vitamin C in 2002.

The Eastern District of New York denied both motions, and tried the case before a jury, which returned a verdict for the plaintiffs. The Second Circuit Court of Appeals reversed, holding that the district court should have granted the motion to dismiss. It found that federal courts are "bound to defer" to official statements by a foreign government regarding the construction of its law, where the construction is "reasonable." The court of appeals reviewed MOFCOM's submissions and cited sources, and concluded that they provided a reasonable construction of Chinese law.

The Supreme Court granted certiorari on only one of three questions presented in the petition for certiorari, after seeking the input of the Solicitor General ("SG"), who responded that the Court should consider:

> Whether a federal court determining foreign law under Federal Rule of Civil Procedure 44.1 is required to treat as conclusive a submission from the foreign government characterizing its own law.[1]

The SG argued that the "Court should review the court of appeals' holding that the Ministry[of Commerce]'s amicus brief conclusively established the content of Chinese law," because a "foreign government's characterization of its own law is entitled to substantial weight, but it is not conclusive," so that the "court of appeals erred by treating the Ministry's amicus brief as conclusive and disregarding other relevant materials."[2]

Throughout, China showed great interest in the case. Not only did MOFCOM submit amicus briefs stating that Chinese law required the defendants' export cartel, but China's Embassy in the United States sent a diplomatic note to the U.S. State Department that "China has attached great importance to this case" and MOFCOM accurately "described China's compulsory requirements concerning vitamin C exports."[3] MOFCOM stated that the district court and the SG were "disrespectful" in questioning its representations on China's law.[4]

With this background and hindsight, the outcome seems inevitable—a unanimous decision written by the Court's civil procedure expert,[5] that a "federal court should accord respectful consideration to a foreign government's submission" regarding foreign law, but must make an independent determination of the law. 138 S. Ct. at 1869.

Justice Ginsburg is a proponent of referencing foreign and international law to inform U.S. judicial decisions.[6] However, neither she nor Justice Stephen Breyer, perhaps the most outspoken justice supporting consideration of non-U.S. law,[7] advocates more than studying foreign law for the light it may shed on the appropriate approach under U.S. law. Moreover, irrebuttable presumptions are often viewed skeptically in U.S. jurisprudence.[8] Therefore, it was unlikely that the Court would endorse a standard of binding deference to a statement by a foreign authority.

Given China's interest in the case, and the underlying issues of foreign sovereign compulsion, act of state and comity, the justices likely felt a need to render a unanimous decision on the threshold question of how to determine the applicable foreign law.

The decision is arguably simply a reading of the plain language of Federal Rule of Civil Procedure 44.1. Rule 44.1 established that the determination of foreign law is a question of law, so that federal courts "may consider any relevant material or source…

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1 Brief for U.S. as Amicus Curiae on Petition for Writ of Certiorari, at I.

2 *Id.*, at III.

3 Joint Appendix 782–84.

4 Brief of Amicus Curiae Ministry of Commerce of P.R.C. in Support of Respondents, at 2, 4–5, 22.

5 Justice Ginsburg taught civil procedure for many years. *See*, Ruth Bader Ginsburg, Remarks for the Second Circuit Judicial Conference at 11 (June 12, 2015) https://www.supremecourt.gov/publicinfo/speeches/RBG_Speech_Second_Circuit_Judical_Conference_06_12_15.pdf.

6 *See, e.g.*, Ruth Bader Ginsburg, "A decent Respect to the Opinions of [Human]kind"; The Value of a Comparative Perspective in Constitutional Adjudication (International Academy of Comparative Law, American University, July 30, 2010) https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10.

7 *See, e.g.*, Stephen G. Breyer, The Court and the World: American Law and the New Global Realities (2015).

8 *See, e.g.*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); James J. Duane, *The Constitutionality of Irrebuttable Presumptions*, 19 REGENT U. L. REV. 149 (2006).

whether or not…admissible under the Federal Rules of Evidence." The Court clarified that the weight given a foreign governmental statement regarding foreign law "will depend on the circumstances," including "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." 138 S. Ct. at 1873-74. This is the type of inquiry and weighing of factors that courts engage in daily.

Moreover, the Court expressly refrained from deciding the outcome if all relevant factors are considered. *Id.* at 1875. On remand, the Second Circuit might consider evidence beyond MOFCOM's statements and still conclude that Chinese vitamin C exporters were legally compelled to fix prices, then find again that comity requires dismissal of the action or remand to the district court for reconsideration of the motions to dismiss and for summary judgment.

On the other hand, if the Second Circuit on remand concludes that the vitamin C exporters were not compelled to fix prices and comity does not require dismissal, then entities may be exposed to *ex-post* challenges under U.S. law to conduct that they may have believed was compelled under foreign law.

Yet, the Supreme Court's decision may be a roadmap to what is needed to support a statement of foreign law. A statement by the foreign jurisdiction's highest court, consistent with the jurisdiction's previous statements and actions, and not subject to attack as simply a litigation position paper, may pass muster and be determinative of the foreign law. With this roadmap, perhaps *Animal Science Products v. Hebei Welcome Pharmaceutical* is not a threat to foreign entities doing business with U.S. entities, but only a caution that conduct known to violate U.S. law should be undertaken only while creating a clear record of the foreign government's role.

Also, the principle underlying the doctrines of act of state, foreign sovereign compulsion and comity is to avoid unnecessary conflict with foreign jurisdictions, while applying U.S. law as the default. Therefore, the Court's decision arguably may provide courts with additional flexibility to avoid such conflicts. For example, if, on remand, the Second Circuit finds that Chinese law did not compel the vitamin C cartel, then at least there is no direct conflict between U.S. and Chinese law.[9]

On balance, the decision in *Animal Science Products v. Hebei Welcome Pharmaceutical* is a helpful clarification of an important point of civil procedure that is not a significant departure from precedent.

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9 China's 1997 Price Law, partly superseded by its 2007 Anti-Monopoly Law, prohibits unofficial cartels. Price Law Art. 14. The AML extends the prohibition to governmental action. AML Chap. 5. Moreover, AML Article 16 prohibits trade associations from organizing cartels. In the U.S., the Export Trading Company Act and the Webb-Pomerene Act exempt certain export cartels from the Sherman Act, but provide no protection from foreign law. It is noteworthy that this vitamin C lawsuit did not follow a U.S. government investigation. The U.S. government brought no antitrust action against the exporters, in contrast to the major criminal investigation it conducted in the mid-1990s that led to dozens of civil treble damage lawsuits against non-Chinese vitamins manufacturers, including the action that resulted in the Supreme Court's application of the Foreign Trade Antitrust Improvements Act in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). This might reflect recognition by the Department of Justice that at least some government compulsion may have been involved in the case of the Chinese vitamin C exporters, so that it exercised prosecutorial discretion to refrain from action. The U.S. state action doctrine exempts from the Sherman Act the intentional or foreseeable result of state government policy. *Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).